SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-423

PROVIDENT LIFE INSURANCE COMPANY, R. W. EDICK, ET AL., AS TRUSTEES OF THE PROVIDENT LIFE INSURANCE COMPANY VOTING TRUST DATED NOVEMBER 15, 1955, AND EXTENDED TO NOVEMBER 14, 1980,

Petitioners,

vs.

RESERVE LIFE INSURANCE COMPANY AND MIDLAND NATIONAL LIFE INSURANCE COMPANY,

Respondents.

REPLY BRIEF OF PETITIONERS

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MAY IT PLEASE THE COURT:

I.

Respondents' supplemental statement of facts refers to a stipulation relating to the record on appeal (Opp. Br. p. 4). It was stipulated that Plaintiffs' Exhibit 32 (R. 2, p. 103) was a copy of the Rules and Regulations for the Solicitation of Proxies, Consents and Authorizations of Domestic Stock Insurers prescribed and promulgated by the North Dakota Director of Insurance.

Opp. Br. refers to Respondents' Brief.

R. 1 and R. 2 refer to Volumes 1 and 2, respectively, of the Appendix filed with the Court of Appeals and certified to this Court.

Pet. refers to Petitioners' Petition.

It was further stipulated that those regulations were in the standard form proposed by the National Association of Insurance Commissioners and were adopted to meet the requirements of Section 12 of the Securities Exchange Act of 1934 with respect to the exemption from registration claimed by the Petitioners (Pet. pp. 7, 18-21). Respondents omit reference to the last sentence of the stipulation: "If either party thinks any portion of the rules are applicable, the applicable portions will be set out in their briefs." None were set out or referred to in Respondents' Brief.

The other parts of the stipulation refer to the *contentions* of Respondents (R. 2, p. 103). The undisputed record is that the North Dakota Commissioner of Insurance concluded that the proxy regulations of his office did not apply to the solicitation of an extension of a voting trust; but that, in any event, the materials filed by Petitioners were in compliance with North Dakota proxy regulations (R. 45, Pet. p. 9).

II.

We find nothing in Respondents' Brief, nor in the cases cited (Opp. Br. 4-10), which militates against our plain and simple argument that the words "registered pursuant to Section 12" mean just what they say and that the decision of the Court of Appeals here is in direct conflict with the Second Circuit in *Republic Technology Fund, Inc.* v. *Lionel Corp.* (Pet. p. 14) and *Upson* v. *Otis* (Pet. p. 15) and the District Court of New Jersey in *Bound Brook Water Co.* v. *Jaffe* (Pet. pp. 14, 15), all three of which construed the word "registered" to *mean* "registered".

To say that there is no conflict between the Court of Appeals here and the Second Circuit because *Republic Technology* "was decided on facts that arose prior to 1964" (Opp. Br. p. 5) and that "there is some doubt about the holding of *Upson* . . ." (Opp. Br. 7, 8) and the SEC disagrees with it (Opp.

Br. 9) is, we submit, with all deference to opposing counsel, fatuous. For, what Respondents are really saying is that *Republic Technology* and *Upson* read "registered" to include "required to be registered",—a goal long sought by the SEC without success except in the Court of Appeals here.

We suggest that it is rather unseemly for the SEC in its *amicus* brief in the Court of Appeals to argue (Opp. Br. p. 10) that Section 14 of the 1934 Act should apply to securities "required to be registered," when the quoted language had repeatedly been denied legislative sanction and the SEC had deleted the language in a final draft it submitted for legislative approval (Pet. pp. 15, 16). Further, SEC Rule 12b-6 (17 CFR § 240.12b-6) provides that Section 14 of the 1934 Act does not become applicable until the securities are *registered* under Section 12.

III.

As to Respondents' II (Opp. Br. pp. 10, 11), our petition cites three cases from this Court clearly revealing that the Court of Appeals failed to construe the statutes at bar according to the hornbook rules of statutory construction laid down in those three cases, *Reliance Electric Company, Blau* and *American Fire and Casualty Co.* (Pet. p. 14).

IV.

As to Respondents' III, we question the practice, if not the propriety, of gratuitous statements of "information orally given by members of the staff of the Securities and Exchange Commission" relative to the comparative number of filings "involving voting trusts" and "other types of securities" and the "quick glance through . . . Best's life insurance reports", and what is "much more prevalent now," and the argument based upon these matters dehors the record (Opp. Br. p. 11).

V.

We see no occasion to reply to points IV and V of Respondents' Brief (Opp. Br. pp. 12-15).

VI.

Finally, we find nothing in Respondents' Brief answering our arguments that:

1. The Court below usurped jurisdiction in bringing within the Securities Exchange Act of 1934 matters in respect of insurance company securities *exempted* therefrom by Section 12(g)(2)(G) of said Act. (Pet. pp. 18-21);

2. The Court below invaded rights reserved to the States and thus violated the Tenth Amendment by holding that the solicitation of the extension of a Voting Trust Agreement involving the common stock of an insurance company by the trustees of said Trust Agreement came within the Securities Exchange Act of 1934 (Pet. pp. 21-24); and

3. The Court below has created a statutory inconsistency which has not been but should be settled by this Court in holding that the same transaction constituted both an offering and sale of a new security within the meaning of the 1933 Act and at the same time the solicitation of a proxy, consent or authorization within the meaning of Section 14(a) of the 1934 Act. The effect is that a transaction lawful under the 1933 Act is unlawful under the 1934 Act (Pet. pp. 25-28).

CONCLUSION

We again respectfully submit that the Petition for Writ of Certiorari be granted for the reasons stated therein.

Respectfully submitted,

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